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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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IN RE:

3 FEDERAL HOUSING FINANCE AGENCY 11 CV 5201 (DLC)

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Also Docket Nos.

5 11 CV 6188, 11 CV 6189, 11 CV 6190,
11 CV 6192, 11 CV 6193, 11 CV 6195,
6 11 CV 6196, 11 CV 6198, 11 CV 6200,
11 CV 6201, 11 CV 6202, 11 CV 6203,
7 11 CV 6739, 11 CV 6916, 11 CV 7010,
11 CV 7048

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9 VNB REALTY,

Plaintiff,

11 CV 6805

10 v.

Bank of America, et al.

11 Defendants.

12 -----x

13 New York, NY

14 December 2, 2011
15 2:00 p.m.

Before:

16 HON. DENISE L. COTE,

17 District Judge

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BRUCE CLARK (First Horizon Nat. Corp and Nomura Holding Amer.)

AMANDA DAVIDOFF (First Horizon Nat. Corp. & Normura Holding)

JEFFREY SCOTT (Barclays Bank PLC)

THEODORE EDELMAN (Goldman Sachs & Co. & Goldman Sachs Mort. Co)

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1 (In open court)

2 THE DEPUTY CLERK: I am going to call each case, and I
3 will ask counsel to please state their name for the record.

4 In the matter of the Federal Housing Finance Agency
5 and others against UBS America, Inc. and others. Counsel for
6 plaintiffs, are you ready to proceed? If you would please
7 state name for the record.

8 MR. SELENDY: Yes, we are. Philippe Selendy for the
9 Federal Housing Finance Agency.

10 THE DEPUTY CLERK: Would you introduce each attorney?

11 MR. SELENDY: For UBS. We are also here with Adam
12 Abensohn. And Manisha Sheth.

13 THE COURT: For the defendant, please state your name
14 for the record.

15 MR. KASNER: Good afternoon, your Honor. Jay Kasner
16 and my partner Scott Musoff from Skadden Arps.

17 THE DEPUTY CLERK: In the case of Federal Housing
18 Finance Agency against JP Morgan Chase & Company and others.

19 Counsel for plaintiffs, please state your name for the
20 record.

21 MR. SELENDY: Again, your Honor, Philippe Selendy and
22 our team.

23 THE COURT: You don't need to reintroduce other
24 members of your team, Mr. Selendy if they are the same. Thank
25 you very much.

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1 For the defendant.

2 MS. SHANE: Penny Shane, your Honor, from Sullivan &
3 Cromwell for JP Morgan.

4 MR. RICE: Tom Rice for RBS Securities which is one of
5 a number of defendants in this case. Do you want to have
6 appearances as you go through them for the main defendant in
7 this case?

8 THE COURT: For each defendant who is represented --
9 well, for each defendant in the case by at least principal
10 trial counsel for them in that case.

11 MR. RICE: In that case, I am appearing for RBS
12 Securities in this case.

13 MR. CLARY: William Clary from Cravath, Swaine & Moore
14 representing the Credit Suisse defendants in the JP Morgan
15 case.

16 MR. KARP: Brad from Paul, Weiss, along with my
17 partner Susanna Buergel, representing the Citigroup defendants
18 in that case.

19 THE DEPUTY CLERK: In the matter of Federal Housing
20 Finance Agency against HSBC North American Holdings, Inc. and
21 others. Counsel for plaintiffs, please state your name for the
22 record.

23 MR. ABENSOHN: Adam Abensohn, your Honor, for FHFA.

24 THE COURT: I'm sorry?

25 MR. ABENSOHN: Adam Abensohn for FHFA.

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1 MR. SPEHR: For HSBC Richard Spehr and Michael Ware
2 from Mayer Brown.

3 THE DEPUTY CLERK: In the matter of Federal Housing
4 Finance Agency against Barclays Bank PLC and others.

5 MS. SHETH: Manisha Sheth on behalf of the FHFA.

6 THE COURT: Any defense counsel in that case?

7 MR. SCOTT: It's Jeff Scott from Sullivan and Cromwell
8 on behalf of Barclays.

9 THE COURT: So, Mr. Scott, you are way back there.
10 You need to come on up. There is a chair for you right up
11 here.

12 THE DEPUTY CLERK: In the matter of Federal Housing
13 Finance Agency against Deutsche Bank AG and others.

14 Counsel for plaintiffs, state your name for the
15 record.

16 MR. SELENDY: Philippe Selendy for FHFA.

17 MR. RICE: Good afternoon, your Honor. Tom Rice for
18 the Deutsche Bank defendants.

19 THE COURT: We are going to read the docket number for
20 each of these cases too to make sure that we are all on the
21 same page with respect to which case we are calling.

22 THE DEPUTY CLERK: Federal Housing Finance Agency
23 against First Horizon National Corp. and others, Docket No. 11
24 CV 6193.

25 Counsel for the plaintiff, please state your name for

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1 the record.

2 MS. CHUNG: Good afternoon, your Honor. Christine
3 Chung for the plaintiff, FHFA.

4 MR. CLARK: Good afternoon, your Honor. Bruce Clark
5 and Amanda Davidoff, Sullivan and Cromwell for the defendant.

6 THE COURT: Mr. Clark, do you want to come up to the
7 jury box?

8 MR. CLARK: I would be glad to join you.

9 THE COURT: Very well.

10 MR. BENNETT: Edward Bennett with my partner David
11 Blatt, Williams & Connolly for Merrill Lynch.

12 THE DEPUTY CLERK: Step up and state your name again
13 for the record for the court reporter.

14 MR. BENNETT: Edward Bennett and David Blatt from
15 Williams & Connolly for Merrill Lynch.

16 MR. KASNER: Jay Kasner on behalf of UBS.

17 MR. CLARY: Richard Clary on behalf of the Credit
18 Suisse defendants.

19 THE DEPUTY CLERK: Is there anyone else in the matter
20 of 11 CV 6193.

21 MS. SHANE: Penny Shane for JP Morgan, Sullivan &
22 Cromwell.

23 THE DEPUTY CLERK: Federal Housing Finance Agency
24 against Bank of America Corp. and others, case number 11 CV
25 6195.

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1 Counsel for the plaintiff, please state your name for
2 the record.

3 MS. CHUNG: Christine Chung for FHFA.

4 MR. BLATT: David Blatt for Bank of America
5 defendants.

6 MR. BENNETT: Edward Bennett for Bank of America as
7 well.

8 MR. BINDER: Neil Binder, Richards, Kibbe & Orbe. We
9 represent several individuals for the Bank of America, in the
10 case of Paul Park, Robert Caruso --

11 THE COURT: I think several is just fine.

12 MR. BINDER: Several, but not all, your Honor.

13 THE COURT: Thank you.

14 Any other defense counsel in that case?

15 So, do you know where defense counsel for the other
16 individual defendants is?

17 MR. BINDER: No, your Honor. Some of them, I think
18 haven't been served.

19 THE COURT: Thank you.

20 THE DEPUTY CLERK: The matter of Federal Housing
21 Finance Agency against Citigroup, Inc. and others 11 CV 6196.

22 Counsel for the plaintiffs, please state your name for
23 the record.

24 MR. SELENDY: Philippe Selendy for FHFA.

25 MR. KARP: Your Honor, Brad Karp for CitiGroup.

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1 THE DEPUTY CLERK: Is there anyone else for defendants
2 in this case?

3 In the matter of Federal Housing Finance Agency
4 against Goldman, Sachs & Company, 11 CV 6198.

5 Counsel for the plaintiff?

6 MR. SELENDY: Philippe Selendy for FHFA.

7 THE DEPUTY CLERK: Is there someone else?

8 MR. EDELMAN: We are here on behalf of defendants,
9 Theodore Edelman, Michael Tomaino and Jordan Razza from
10 Sullivan & Cromwell.

11 THE COURT: Spell your last names, please.

12 MR. EDELMAN: Certainly, your Honor. Edelman,
13 E-D-E-L-M-A-N.

14 MR. TOMAINO: T-O-M-A-I-N-O.

15 MS. RAZZA: R-A-Z-Z-A.

16 THE COURT: Thank you. If you could come up and join
17 us in the jury box.

18 MR. EDELMAN: We represent also the Goldman Sachs
19 defendants in JP Morgan Chase matter, which is 11 CV 6188.

20 THE DEPUTY CLERK: Federal Housing Finance Agency
21 against Credit Suisse Holdings USA, Inc., 11 CV 6200.

22 Counsel for the plaintiffs, please state name for the
23 record.

24 MS. CHUNG: Christine Chung for the FHFA.

25 MR. CLARY: Richard Clary for all the defendants in

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1 that case.

2 THE DEPUTY CLERK: Thank you.

3 Paragraph Federal Housing Finance Agency against
4 Numora Holding America, Inc. and others, 11 CV of 6201.

5 MR. ABENSOHN: Adam Abensohn for the FHFA.

6 MR. CLARK: Bruce Clark for the Nomura defendants.

7 MR. RICE: Tom Rice for RBS Securities.

8 THE DEPUTY CLERK: In the matter Federal Housing
9 Finance Agency against SG America, Inc. and others, case number
10 11 CV 6203.

11 Counsel for the plaintiffs.

12 MR. KASOWITZ: Marc Kasowitz for FHFA. My partner,
13 Mike Shuster and Kanchana Leung.

14 THE DEPUTY CLERK: For the defendant.

15 MR. KASNER: Good afternoon again, your Honor. Jay
16 Kasner and Scott Musoff from Skadden, Arps for the defendants.

17 MS. SHANE: Penny Shane Sullivan, Cromwell for JP
18 Morgan.

19 MR. RICE: Tomorrow Rice for Deutsche Bank Securities.

20 THE COURT: Federal Housing Finance Agency against
21 Morgan Stanley and others, case number 11 CV 6739.

22 Counsel for the plaintiffs, please state your name for
23 the record.

24 MR. KASOWITZ: Marc Kasowitz for FHFA.

25 MR. ROUHANDEH: Good afternoon, your Honor, Jim

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1 Rouhandeh from Davis, Polk & Wardwell for Morgan Stanley.

2 MR. CLARY: Richard Clary for the Credit Suisse
3 defendants.

4 MR. RICE: Tom Rice for RBS Securities.

5 THE COURT: The Federal Housing Finance Agency against
6 Countrywide Financial Corporation and others, 11 CV 6916.

7 Counsel for the plaintiff, please state your name for
8 the record.

9 MS. CHUNG: Christine Chung for the FHFA.

10 MR. PASTUSZENSKI: Good afternoon, your Honor. Brian
11 Pastuszenski from Goodwin Procter LLP for Countrywide
12 defendants. And with me my partner, Mark Holland from Goodwin
13 Procter.

14 THE DEPUTY CLERK: Counsel, if you could come forward
15 and state your name.

16 MR. WILLINGHAM: Good afternoon, your Honor. David
17 Willingham, Caldwell Leslie on behalf of defendant Stanford
18 Kurland and Jeff Grogin.

19 MR. LOGUE: Kevin Logue from Paul Hastings for
20 defendants Boone, Kripalani, McLaughlin and Sandefur.

21 MR. WU: Aric Wu from Gibson Dunn for Citigroup
22 Deutsche Bank, RBS and UBS.

23 MS. GORDON: Good afternoon, Keara Gordon from DLA
24 Piper for defendant Eric Sieracki.

25 MR. KLUGMAN: Scott Klugman from Levine Lee for

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1 defendant David Spector.

2 MR. BENNETT: Edward Bennett and David Blatt from
3 Williams & Connolly for Bank of America.

4 THE DEPUTY CLERK: Federal Housing Finance against
5 Ally Financial, Inc. and others 11 CV 7010.

6 MR. KASOWITZ: Marc Kasowitz for plaintiff.

7 MR. SPEHR: Richard Spehr, Michael Ware, Mayer Brown
8 for Ally.

9 MR. KASNER: Good afternoon again, your Honor. Jay
10 Kasner for UBS and the Ally Financial matter.

11 MR. KARP: Brad Karp for Citigroup, Citigroup
12 defendants.

13 MR. CLARY: Richard Clary for Credit Suisse
14 defendants.

15 MS. SHANE: Penny Shane for JP Morgan.

16 MR. EDELMAN: Theodore Edelman for Goldman, Sachs &
17 Company.

18 MR. SCOTT: Jeff Scott for Barclays Capital, Inc.

19 MR. RICE: Tom Rice for RBS Securities.

20 THE DEPUTY CLERK: In the matter of Federal Housing
21 Finance Agency against General Electric Company and others,
22 case number 11 CV 7048.

23 MR. KASOWITZ: Marc Kasowitz for FHFA.

24 MR. DANILOW: Greg Danilow, Weil, Gotshal for the
25 General Electric defendants.

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1 MR. ROUHANDEH: Jim Rouhandeh, Davis Polk for Morgan
2 Stanley defendants.

3 MR. CLARY: Richard Clary for Credit Suisse
4 defendants.

5 THE COURT: Thank you.

6 THE DEPUTY CLERK: There is one more.

7 MS. HAUSER: Sandra Hauser for several individual
8 defendants. I apologize for not introducing sooner.

9 THE COURT: That's fine.

10 MS. BURNS: Also for case 6188, Jade Burns for
11 defendant Jeffrey Wertleiser from Kramer, Levin, Naftalis &
12 Frankel.

13 MS. DeARCY: Lashann DeArcy, your Honor, also for case
14 6188. I am with Morrison & Foerster for defendants Michael
15 Nierenberg and Thomas Moreino.

16 MR. CHEPIGA: Your Honor, Michael Chepiga from
17 Simpson, Thacher 6188 for defendant Sam Molinaro.

18 THE DEPUTY CLERK: You can sit. Come up with way.
19 There are more chairs here.

20 THE COURT: I am going to call one additional case,
21 VNB Realty against Bank of America and others, 11 CV 6805. For
22 the plaintiff.

23 MR. TSAPATSARIS: Peter Tsapatsaris from Peter N.
24 Tsapatsaris, LLC for VNB Realty.

25 THE COURT: For the defendants in 11 CV 6805.

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1 MS. KOTLER: Meredith Kotler from Cleary Gottlieb on
2 behalf of all defendants except Mr. Kamat, who has not been
3 served.

4 MR. BINDER: Your Honor, unless I missed it, I don't
5 believe 11 CV 6202 was called FHFA, Merrill Lynch.

6 THE COURT: 6202?

7 MR. BENNETT: Yes.

8 THE COURT: Thank you so much. So we will call that
9 case now.

10 FHFA against Merrill Lynch and others 11 CV 6202 for
11 the plaintiff.

12 MS. SHETH: Manisha Sheth often behalf of FHFA.

13 THE COURT: For the defendants?

14 MR. BENNETT: Ted Bennett on behalf of Merrill Lynch.

15 MR. BINDER: Neil Binder on behalf of individual
16 defendants.

17 THE COURT: Thank you, Mr. Binder.

18 So, as much as I studied the appearance sheet lists
19 that I have, I really appreciate this demonstration of the
20 overlap in parties and their counsel. Let me thank you for
21 making yourselves available today. I expect counsel have a lot
22 of issues they would like to raise with me. Let me give you an
23 overview of the issues I have identified that I would like to
24 cover this afternoon.

25 there are a number of administrative issues that I

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1 want to address with you. There is the issue of outstanding
2 motion practice and the scheduling of that motion practice. I
3 want to talk about discovery issues.

4 I want to talk about coordination of any cases that
5 are not before me right now and get a sense of how many more
6 cases there might be filed in this court or in other courts
7 that may or may not be related.

8 I want to explore on that coordination issue the case
9 I will refer to as 6805, which was the penultimate case called.
10 I expected it to be the last, but it was the penultimate case
11 called.

12 Lastly, on my list is settlement. I want to talk
13 about a process to get these cases organized for settlement
14 discussions. I am not expecting them to be settled tomorrow,
15 but I want to begin talking about process.

16 So let's just talk about administrative matters. I
17 should say, I won't end this conference without making sure
18 everyone has an opportunity to present any additional issues
19 they think should be discussed at today's conference.

20 Consolidation of these cases. I have talked with our
21 clerk's office because I am concerned about getting notice to
22 everybody in the most efficient manner possible and yet making
23 sure that each of these cases is treated separately as
24 appropriate. So I think probably -- and you can speak to this
25 and explain why you think we should handle it some other way,

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1 but I think I probably will not be entering any kind of
2 consolidation order even for pretrial purposes, but that
3 everything that I issue in this group of cases, I will docket
4 in the first case 5201, and in every other case where it is
5 appropriate to do so with respect to that order.

6 So, let us say that I was granting a motion to dismiss
7 in the case 6200, that opinion or order would be docketed two
8 places: In the case 5201 and in the case 6200. Some docketing
9 will occur in every case, and it will have the kind of caption
10 one way or another like you saw with the scheduling of this
11 conference.

12 That means that -- and, again, there may be many
13 volunteers for this task I think we need to talk about, and it
14 would be helpful to me to have just for liaison purposes and
15 for no other purposes, not substantive, one plaintiff's counsel
16 that I can call or my chambers can call, and one defense
17 counsel that my chambers can call who would take upon
18 themselves the obligation to make sure everyone else is
19 notified. Obviously, I hope to do most notification through
20 docketing and reliance on our ECF notice process, but unless
21 you are part of the case 5201, you will not get ECF notice, and
22 this is what I talked to our clerk's office about. I can only
23 get ECF notice to all of you for something filed in 5201 if I
24 consolidate all the cases into 5201.

25 So, Mr. Kasner, you are the likely volunteer.

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1 MR. KASNER: Your Honor, and I appreciate it, if you
2 hadn't asked, I actually was going to raise my hand. The one
3 caveat, your Honor, is Ms. Farrell has since gone to the U.S.
4 Attorney's office. However, I'm confident that some of our
5 colleagues will fill her very large shoes. So we're happy to
6 do that. Thank you, your Honor.

7 THE COURT: Thank you, Mr. Kasner. It's a pleasure to
8 see your name on this roster today.

9 MR. KASNER: Appreciate it, your Honor. Thank you.

10 THE COURT: So for plaintiff's volunteer, Mr. Selendy?

11 MR. SELENDY: Yes, I will be glad to do that, your
12 Honor.

13 THE COURT: Thank you so much. My clerk's office asks
14 me to remind everyone that your email address and your law firm
15 identification information should be current. Make sure it is.
16 Make sure you have an ECF log-in and password. Make sure you
17 filed a notice of appearance. All of those things have to
18 happen if you are going to get effective ECF notice from us.

19 In terms of communication with the Court, we do not
20 accept faxes. I have no secretary. I have three wonderful law
21 clerks and no secretary. So we operate by letter, and, as you
22 know, in the Southern District you cannot file letters on ECF.
23 So it is snail mail or hand delivery.

24 The letter can be no longer than two pages. If it
25 requires more substantive discussion than two pages permits, I

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1 will get everybody on the phone, or, if necessary, hold a
2 conference. I won't necessarily wait for a responsive letter
3 before I get everybody on the phone. It depends.

4 Hand deliveries. If something is urgent and you need
5 me to act on it that very day, and, therefore, read your letter
6 that very day, it can be hand delivered to the Worth Street
7 entrance, but we won't know it's there unless you tell us.
8 Things that are delivered to the Worth Street entrance go
9 through security and then they go to the mail room and then
10 hopefully I will get it within the next day or two. So if you
11 would actually like me to read it that day, that's fine, just
12 call us and let us know there's a hand delivery, and have your
13 messenger call chambers again when it's actually there, so one
14 of my staff can go down and retrieve it.

15 If you hand deliver something to us Friday after 5:00
16 or on a weekend, which hopefully won't happen, but in any
17 event, you should understand that the security folks are going
18 to put it in the night depository so I will not see it until
19 Monday afternoon. So, it is particularly important in those
20 circumstances that you have made a phone call so that we can
21 make sure that we personally pick it up.

22 There is one disclosure I want to make. I have two
23 wonderful sisters. One of them happens to live in Seattle.
24 Her name is Lenore Cote, and she is vice-president of
25 operations risk at the Federal Home Loan Bank of Seattle.

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1 So let's turn to motion practice. I am putting to the
2 side for a moment the VNB case. So right now I am just going
3 to talk about the other cases. I want to thank counsel for the
4 way they responded to Judge Kaplan's order which helped inform
5 this Court about management issues and the extent that there is
6 overlap or lack of overlap among the cases. Out of those
7 submissions and a discussion among several of us, and then
8 ultimately agreement by all of us, a volunteer raised her hand
9 and has this group of cases, very happily.

10 So the first thing I did was issue the order staying
11 all motion practice except in the lead case 5201.

12 I want to make sure that we set up briefing of the
13 motion to dismiss issues in the way that's most helpful to the
14 plaintiffs and defendants. I want to make sure that 5201 is a
15 good vehicle. I notice it doesn't have a 10-b claim.

16 I have the second lowest Docket No. 6188 as it was
17 originally filed, and it does have a 10-b claim.

18 I am thinking about having two motions to dismiss. I
19 don't want to do duplicative work, but I was thinking that
20 counsel might find it useful to have actually complete motions
21 to dismiss in at least one case and maybe two, and that at
22 least one of those cases should be a case with a 10b-5 claim.
23 So I am anxious to hear from you on that.

24 I am thinking, and you noticed this from my proposal,
25 that plaintiffs would have the right to amend in response to

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1 the first motion to dismiss, but that would be it with respect
2 to any issue raised in the motion to dismiss. It would be apt
3 to cure the issues that were raised or not, and then we would
4 have full briefing of the motion to dismiss if it were renewed.

5 I would like to do that on sort of a tight schedule,
6 not unreasonably tight because we have holidays here and it is
7 falling at a period of time when I know lots of people have
8 family plans and travel plans, but I think that you would like
9 to know, at least from the representative cases that we are
10 going to choose out of today's meeting and the motion to
11 dismiss was due in 5201 today, at least on the common issues, I
12 thought you'd like to have as soon as I am able to get it to
13 you, a reading on the issues presented by any motion to
14 dismiss.

15 Let me tell you what I think would happen after that.
16 I am thinking that I will stay discovery until I rule on the
17 motions to dismiss, and I am aware that we have motion practice
18 ongoing, whether the PSLRA stay of discovery applies or not
19 given the nature of the plaintiffs here, or the plaintiff, but
20 that if a sufficient amount of the one or two complaints that
21 are tested through the motion practice survive, that then we
22 would move immediately into document discovery on all the cases

23 I have one caveat on that, and, that is, I don't have
24 a feeling yet for how important the statute of limitations
25 issues are going to be and how unique they are with respect to

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1 the different cases, so whether or not any resolution of a
2 statute of limitations issue with respect to 5201 and
3 potentially 6188 would be decided, how universally those
4 rulings would apply across the board I have no feeling.

5 (Pause; machine malfunction)

6 (In open court)

7 THE COURT: Just to summarize, we just discussed in
8 the interim the fact that there are many private actions filed
9 around this country in different courts brought by private
10 plaintiffs based on the securitizations that are present in the
11 Fannie Mae/Freddie Mac litigation before me.

12 So I think we were at the point where I was anxious to
13 hear from counsel about the best way to approach motion
14 practice. Again, while you can say anything, I am most
15 interested in hearing whether 5201 is a good vehicle to
16 litigate the common issues in, whether or not it makes sense to
17 add a 10b-5 case to the initial motion practice, and whether if
18 it does make sense, it should be 6188 which is, again, just
19 arbitrarily the lowest Docket No. case with a 10b-5 claim in
20 it.

21 Let me start with Mr. Selendy. I will give you a
22 chance to be heard on that issue

23 MR. SELENDY: OK, your Honor. We think that the
24 coordination approach that you outlined, coordination but not
25 consolidation is appropriate and sensible.

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1 With respect to the motions to dismiss, as you are
2 aware, our view is that the so-called common issues outlined by
3 defendants in many cases have fact-intensive questions that
4 truly are not common, but if there is to be a case designated,
5 we think it's entirely appropriate to select the first filed
6 and second filed cases.

7 Just to clarify, we have not asserted 10b-5 claims; we
8 have asserted common law fraud claims, and that will be true in
9 the half dozen cases you referred to. But those do raise
10 issues which are distinct from the claims in the non-fraud
11 cases, obviously because scienter is an element only for the
12 fraud case whereas the Section 11 and 12 claims do not involve
13 that.

14 There are also the state statutory claims, although
15 those are common across all of these actions, and there are
16 certain very important differences between the state statutory
17 claims and the federal statutory claims that we can address.

18 In general, your Honor, we think that the approach is
19 sensible. Our primary concern is not so much the scheduling of
20 the briefing but discovery, as we set forth in the PSLRA
21 briefing. This is a series of public actions brought by
22 independent federal agency. In its capacity as conservator for
23 Fannie Mae Freddie Mac, it's trying to vindicate public rights,
24 public interests in the protection of the housing market and
25 its statutorily mandated objective of preserving and conserving

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1 the assets of the GSE's. And while we were prepared to extend
2 to all defendants a stipulation until today, that was based on
3 the presumption that all briefing would be done as of today,
4 and we had not agreed that discovery would be held back.

5 So, what we are concerned about is that we will run
6 another three or six months before discovery begins, and we
7 would like to see that process start even as to limited areas,
8 for example, production of the loan files which are required to
9 be maintained by defendants, initial disclosures, initial
10 discussions of custodians and electronic search terms. We
11 think it's very important to begin that process. And as to the
12 briefing of defendant's motions, your schedule sounds
13 appropriate.

14 THE COURT: Thank you very much, Mr. Selendy.

15 MR. SELENDY: Thank you.

16 THE COURT: Mr. Kasner.

17 MR. KASNER: Good afternoon, your Honor. If it please
18 the Court, for efficiency's sake, we had spoken amongst
19 ourselves. I am prepared to address your Honor's questions
20 with respect to motion practice, if that is all right with the
21 Court. Mr. Clary, who is the litigating client on the issue of
22 lifting the stay, is prepared to address issues associated with
23 discovery, your Honor.

24 Then counsel from Davis Polk will address the remand
25 if you have any issues relating to remand because our clients

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1 are not associated primarily with any of those motions, if that
2 is all right with your Honor.

3 With respect to the motion practice itself, we have
4 not had an opportunity to confer with Ms. Shane, who is counsel
5 in the JP Morgan case.

6 Yes, the UBS case, which is the lowest number, does
7 not have a 10b-5 claim; it doesn't have a common law fraud
8 claim. If there are pleading issues associated with that type
9 of claim, scienter being one of them, actual reliance under
10 applicable state law principles potentially being another. If
11 it please the Court, that is something I would defer to counsel
12 in the JP Morgan case to address.

13 With respect to the issue that your Honor asked about,
14 the motion practice that as soon as I get back to the office, I
15 will review for one last time and then we are prepared to file.

16 There are issues that cut across all of the cases.
17 Your Honor picked up one with respect to the statute of
18 limitations. There are a number of case dispositive issues,
19 your Honor. I know your Honor well enough to know I am not
20 certainly here today to argue those motions. I only advise the
21 Court of sort of generally what the issues are so that your
22 Honor can understand why they would cut across if that is
23 something that the Court is interested in.

24 THE COURT: No. I just want to know if you think 5201
25 is a good vehicle to present those common issues.

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1 MR. KASNER: Your Honor, the issues associated with
2 all of the cases that are raised in our motion would be
3 appropriate for all of the other cases, your Honor. There are
4 some issues that are derivative of when Fannie and
5 Freddie actually purchased these securities, but in terms of
6 statute of repose arguments under federal law and the state
7 laws under which the claim in our case are brought and the
8 others, there is an absolute bar, your Honor, of three years
9 from the date of purchase. It is undisputed in the record
10 cutting across all of the cases, your Honor, that the last
11 purchase by Fannie and Freddie was more than three years ago.
12 The legal arguments that will be presented by both sides as to
13 why that repose does or does not apply will apply across all of
14 the cases.

15 There are arguments concerning inquiry notice. Those
16 will apply, by and large, to all of the cases.

17 There is an issue, your Honor, with respect to the
18 impact of tolling agreements as a tertiary argument. Again,
19 depending on individual cases, the legal principles that your
20 Honor articulates in the UBS matter, the lowest number, ought
21 to apply across the board there as well. I'm not saying this
22 to your Honor because our papers are ready, but I do think,
23 your Honor, that they do cut across, and it would not surprise
24 the Court to learn that we obviously had the benefit of views
25 of co-counsel on the common issues as well.

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1 THE COURT: I was expecting that. I had thought I
2 could put that in the order that everybody should consult, but
3 I knew you would. Thank you.

4 What about this, Mr. Kasner, if the plaintiff amends
5 and you decide to move to dismiss again, how about making it to
6 dismiss the entire pleading as opposed to just addressed to the
7 common issues, or is the motion you've already prepared to
8 dismiss the entire pleading?

9 MR. KASNER: For our client in the lowest numbered
10 case, your Honor -- I keep saying lowest number I should know
11 it -- 5201, yes, it would be to dismiss the whole case.

12 At this juncture there isn't unique jurisdictional or
13 other issue that would apply to us that we're not raising.
14 That is not to say, your Honor, that down the road should some
15 individual issue be decided by the Court that somehow would
16 apply to us that we wouldn't come back to the Court and say we
17 should be dismissed as well.

18 THE COURT: Ms. Shane, is it helpful to have a motion
19 to dismiss in a case of the fraud claim or not?

20 MS. SHANE: If that is what your Honor would prefer to
21 have, JP Morgan would be pleased to have its case serve as that
22 vehicle. If your Honor wouldn't mind, I would like to consult
23 with my colleagues briefly about whether, given their greater
24 familiarity with their own cases and the pleadings in them, a
25 comparison among us about which would be a good vehicle and

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1 whether this would be in fact the best one, given the number,
2 it is in fact right.

3 It seems perfectly reasonable, and I don't doubt that
4 we could get there, but it might be that I don't know of a
5 particular way in which one of their cases does get there.

6 THE COURT: Well, we are going to take a break so
7 folks will have a chance at the appropriate point to consult
8 and revisit any of these issues.

9 I would be happy to have just one motion to dismiss.
10 So, if you tell me that there is really not enough extra
11 learning that you get from a decision on a case with a fraud
12 claim, then I feel no need to decide a second motion to dismiss

13 MS. SHANE: Your Honor, if I might, I think one of the
14 things we would like to consult about and get back to you is
15 the suspicion that there may be nothing to be added at this
16 stage with respect to fraud because if the pleading does not
17 survive the arguments that are being made with respect to the
18 statute of limitations, for example, and also the common law
19 claims that are asserted in the UBS matter, including negligent
20 misrepresentation, one could infer that the pleading will not
21 survive on the fraud standard or its elements.

22 THE COURT: Absolutely. That would be, I think, the
23 assumption.

24 MS. SHANE: Thank you.

25 THE COURT: Good. So why don't we say that everyone

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1 will have a chance during our break to talk about these issues,
2 but right now based on what I have heard, there will be just
3 the one motion to dismiss. It will be in 5201. There will be
4 an amendment or not, and if there is an amended pleading, we
5 have a schedule for it, and then we have the renewed motion to
6 dismiss and it would be made against the complete complaint to
7 the extent defense counsel can articulate arguments. It
8 wouldn't be restricted to the so-called common issues. They
9 would be included, but it wouldn't be restricted to them.

10 Counsel, I proposed a schedule for this motion
11 practice. I haven't heard anybody say that that schedule won't
12 work. I have suggested that if there is an amendment, it would
13 be filed December 21. If there is no amendment, then
14 opposition would be due January 6, and reply would be due
15 January 27. I'm not hearing opposition.

16 MR. KASOWITZ: Your Honor, before we turn to the
17 schedule, I just have one question about the issue of a
18 common -- a motion with respect to a complaint that would be
19 common to others.

20 THE COURT: Counsel, I'm so sorry, I'm going to ask
21 you, and really everyone else who stands, just because there
22 are so many voices to be heard here, that before you speak, if
23 you could just identify yourself for the record.

24 MR. KASOWITZ: I'm sorry for that, your Honor, of
25 course. Marc Kasowitz for plaintiff. The question I have is

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1 this, your Honor -- and this will be helpful to us when we
2 confer amongst ourselves, and I'm sure when the defendants
3 do -- but I am assuming that it is not the case that a decision
4 on a complaint that's common will end up necessarily to be
5 binding as to all other matters.

6 This is, I take it, your Honor, for the Court's
7 edification on issues that might deem to be common, but there
8 are many, many different issues in all of these complaints
9 including ones that would differ with respect to almost all of
10 the claims. So, while some of the issues certainly are common
11 and some of the legal argument will be common, there are so
12 many factual disparities and the like that the Court isn't
13 suggesting, I assume, that there will be a binding effect to
14 the motion on the first complaint.

15 THE COURT: No, that is absolutely correct. Thank you
16 so much, Mr. Kasowitz for raising that issue. It's an
17 important thing for us to all -- for me to articulate my
18 understanding of the impact of the decision on the motion to
19 dismiss in 5201.

20 Every case is being treated on its own merits. This
21 is not consolidated litigation. So I will do my best to
22 address any motion to dismiss that is made in 5201. The
23 complaint will survive or it won't. If it survives, I plan --
24 right now, I am going to be a lot wiser after I address this
25 motion practice, but the presumption would be that discovery

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1 will go forward in all cases, at least document discovery and
2 at least core document discovery, and we are about to get to
3 the discovery issue in a moment.

4 But there would be a right to bring other motions to
5 dismiss in the other actions or no motion to dismiss an answer,
6 but in bringing a motion to dismiss and I've denied the
7 argument that you're about to make in addressing the same issue
8 in 5201, I plan probably to just adopt my reasoning in 5201.

9 Again, the only exception that I am thinking about
10 now, and I will be much wiser after I have the full briefing on
11 that first motion to dismiss, is whether or not if some other
12 case has a terrific statute of limitations argument that has
13 not been captured by the 5201 briefing, whether or not I should
14 stay discovery in that particular action because of its unique
15 statute of limitations argument.

16 So does that answer your question Mr. Kasowitz?

17 MR. KASOWITZ: It does, your Honor. Thank you.

18 THE COURT: Meanwhile, I would be resolving the remand
19 motions as promptly as I could.

20 So I think just to summarize where we are again -- you
21 can revisit this after you have your joint meeting -- but there
22 is only going to be one motion to dismiss. It's going to be in
23 5201. We are not going to have a motion to dismiss in 6188.
24 There is nothing to be gained by it at this initial phase.

25 And we move on now to discovery. Let me talk about

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1 discovery. I do think it makes sense for counsel to start
2 their discussions about electronic discovery protocols, and
3 that we set a schedule today for those discussions to be
4 completed and any failures to agree to be raised with me.

5 I am going to let during the break you folks talk
6 about what would be a reasonable schedule for those discussions
7 given the fact that it's December and we are moving into the
8 holiday period, but I would like an end date for an agreement
9 or a two-page letter to me outlining the issues that there is a
10 failure to agree upon and then we will have a conference.

11 With respect to document discovery, I can't remember
12 who mentioned it here, but someone mentioned the loan files.
13 Are the loan files electronic or are they hard copy?

14 MR. SELENDY: Your Honor, Phillipe Selendy. Typically
15 in our experience, the electronic files, the loan files are
16 maintained both in electronic form and hard copy, although it
17 depends on how good the operations are of the various banks and
18 services. There is a contractual obligation for those files to
19 be maintained as to every single securitization, and that is
20 because those are the basic documents that inform the quality
21 of the loan, the creditworthiness of the borrower, the value of
22 the property and the like, and the trustees in the various RMBS
23 trusts are entitled to get access to those files.

24 It's a primary source of evidence, although not the
25 only source of evidence, to test whether the representations of

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1 warranties made as to individual loans are in fact accurate and
2 whether those loans were eligible to be included in the trust
3 or not.

4 So, all of the defendants who maintain loan files are
5 in fact obligated to maintain them in a way that can be readily
6 transferred upon demand, and that is why we focused upon that
7 as an initial request because that should not be unduly
8 burdensome, and it's something that ought to be maintained in
9 the ordinary course and readily handed over.

10 THE COURT: They may be accessible, but it may still
11 be burdensome. Can you give me a sense -- and there may be no
12 average -- how many loan files are behind any one
13 securitization?

14 MR. SELENDY: That does vary. It can range from the
15 thousands to the tens of thousands, although we are prepared to
16 frame a request that is much more narrow than that because we
17 believe that the allegations of systemic representation can be
18 tested on a sampling basis.

19 So, provided we avoid any cherry picking of those
20 loans, and we identify a random sort, then we can identify a
21 much smaller number in order to then evaluate that. And we
22 would be prepared to do that across the cases.

23 THE COURT: OK. Is it Mr. Clary?

24 MR. CLARY: Yes, your Honor. Richard Clary for Credit
25 Suisse defendants, and I am counsel in six of the 18 cases we

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1 have here today. I'm also counsel for Credit Suisse in a
2 variety of other lawsuits by institutional investors bringing
3 claims similar to the Fannie and Freddie claims, so I actually
4 have pretty good firsthand information about how discovery has
5 proceeded.

6 Just to set the table, your Honor, in this set of
7 cases, the FHFA cases, there are 535 different securitizations
8 at issue across 18 cases which translates, because we have been
9 doing the math and collecting the information on the number of
10 loans in each of the pools, it's over 2.7 million loans, so
11 that is over 2.7 million loan files.

12 In other litigation, principally litigation over
13 whether or not to stay discovery in the state court actions
14 where there is no PSLRA stay, the evidence has been that on
15 average, an average loan file in one of these has about 300
16 pages. So that takes us to 815 million pages if they're just
17 on the 300 page. Some of the loan files in other cases have
18 had over a thousand pages in a loan file. Some will have less
19 than 300, but on average the figures we have been getting are
20 300 pages.

21 The loan files are in many instances not held by any
22 of the defendants. They're held by non-parties, by various
23 services, for instance.

24 In at least some of the state court cases, I am aware
25 that those non-parties came forward and said we don't keep the

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1 loan files in one physical place. We have collections of
2 electronic documents. We have also boxes of hard copy
3 documents that are in various warehouses with various vendors,
4 and that what would be required would be for those, whoever has
5 the loan files, and frequently it's non-parties, to physically
6 pull the hard copies and the electronic copies because they
7 keep the parts present that they actually need to be able to
8 use, and the rest goes off to various warehouses and mountains
9 or wherever they go. And they would have to pull all that
10 material, reassemble each of the loan files, and then of course
11 they have to be reviewed because, as I'm sure your Honor is
12 aware, all of the loan files would contain a great deal of
13 personal financial information. There will have to be
14 protective orders entered. Some of that information may still
15 have to be blocked out under various federal statutes such as
16 the borrower's social security numbers and things like that.

17 There are a lot of mechanical issues to be addressed.
18 So it's not nearly the simple process that Mr. Selendy
19 suggested. It is quite a bit of time, effort and money on the
20 part not only of the defendants to the extent they have loan
21 files but of the non-parties who have loan files.

22 THE COURT: What I am hearing really suggests that
23 both plaintiff's counsel and defense counsel may actually be in
24 agreement that we need a good sampling technique. That it
25 would be extraordinarily burdensome and inefficient to

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1 reassemble, gather, review and analyze all of these files.

2 MR. CLARY: Your Honor, may I intercede?

3 THE COURT: Yes.

4 MR. CLARY: Although what I described is one of the
5 reasons why we think it is entirely appropriate to not commence
6 that effort until such time as your Honor has had a chance to
7 at least rule on motions to dismiss in the test case, because
8 at least some of the grounds of that motion will dispose of all
9 of the actions, and, therefore, any need to look at any of
10 these if in fact the cases proceed, I for one am somewhat
11 skeptical about the sampling for the simple reason that the
12 claims here are that in each securitization which has its own
13 prospectus supplement describing its particular mortgage pool
14 whether or not there are material misstatements about that
15 mortgage pool, and I am not sure -- there's been some
16 discussion in various cases around the country about whether or
17 not sampling would or would not work, and there are some
18 serious issues as to whether in fact you can create a
19 statistical sample that in fact covers each of those 595
20 separate pools because each pool has to be analyzed against the
21 supplemental prospectus towards that pool and for that tranche
22 of that pool that these particular clients Fannie and Freddie
23 have purchased. So I am certainly not --

24 THE COURT: Do I have the wrong number? Is it 535?

25 MR. KASNER: I'm sorry, 535 securitizations, but

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1 within those securitizations there are tranches and different
2 mortgages are relied on to pay different tranches, and I
3 believe the total number of tranches is 600 something. I had
4 had that number, and, I apologize, I lost it in the papers.

5 THE COURT: OK.

6 MR. SELENDY: Your Honor, may I respond briefly?

7 THE COURT: Well, sure.

8 MR. SELENDY: I just wanted to point out first that
9 Mr. Clary's argument about the extraordinary difference between
10 all of the securitizations is obviously in direct tension with
11 their argument that these issues are common and can be commonly
12 tested. Moreover, in both federal and state court in New York,
13 the principle of sampling specifically as to RMBS trusts in
14 order to determine whether there have been systemic
15 misrepresentations of representations and warranties as we have
16 alleged here as to several different categories of
17 representations of warranties, that has been accepted. And
18 there is a reason for it is --

19 THE COURT: Well, Mr. Selendy, I don't want to cut you
20 off but I am. We are not going to argue the issue right now.

21 MR. SELENDY: I did have one proposal. We are
22 certainly prepared to work with defense counsel to identify
23 those files that are in fact maintained electronically, to
24 select files on a sampling basis which reduces the burden of
25 defendants, and obviously it will be our burden to demonstrate

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1 to the court why sampling is appropriate. We are totally
2 prepared to do that.

3 The servicers are in fact obligated to maintain the
4 files in order to exercise their servicing responsibilities,
5 which is why it's somewhat difficult for them to say they don't
6 have the files. We're prepared to work with counsel.

7 THE COURT: Thank you.

8 So, during this period of briefing and analysis of the
9 motion to dismiss, besides working on a protocol for the
10 production of any electronically kept materials, I do want
11 counsel to work to see if you can achieve agreement with
12 respect to production of a sample of loan files. I will hear
13 you on a schedule that you'll discuss and present to me after
14 our break if you are not able to reach agreement about it, and
15 we will take that up at a separate conference, but I want you
16 to use this next month or two to try to organize a discovery
17 plan that would include sampling of the loan files.

18 I think as a practical matter, the burden on the
19 defendants and the plaintiffs of personally and individually
20 reviewing 2.7 million loan files, each of which has at least
21 300 pages, says there has to be a better way. So, I am going
22 to count on you to figure out the better way, and use this time
23 to do that, and give me a schedule by which you will have
24 finished those discussions and we will meet again if you don't
25 have agreement.

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1 I want you to use this time also to come up with a
2 discussion about limitation on depositions should we get that
3 far. And Mr. Kasner and Mr. Karp at least are familiar with
4 one system that was used before me for limiting the number of
5 days of depositions. There are many different systems that can
6 be used to reduce the burden of depositions, so I want you to
7 use this time as well to think creatively about how to manage
8 the deposition process.

9 I do not know if there is some core discovery here
10 that can be produced relatively expeditiously once discovery
11 begins that would give the parties great insight into the
12 factual development of this case such that having that
13 discovery in hand would permit you to make a reasonable
14 assessment about settlement discussions.

15 So I want you also to think about sequencing of
16 discovery. I don't know that this is a case that you can
17 identify some core group of documents or a 30(b)(6) deposition
18 or something that would give you the insight to put you in a
19 good position to settle this case sooner rather than later, or
20 these cases.

21 So that is what I wanted to talk about with respect to
22 discovery. Let's move on to coordination issues.

23 MR. CLARY: Your Honor?

24 THE COURT: Yes.

25 MR. CLARY: Did you want me -- I know Mr. Selendy

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1 started his arguing about the PSLRA. Did you want me to
2 discuss at all the PSLRA or should we leave that, and,
3 similarly, if your Honor is inclined to decide now that
4 discovery will be held in abeyance at least through the motion
5 to dismiss on a test case, then perhaps my office can be
6 relieved of the burden of filing the reply brief on the PSLRA
7 status that is due next week. Otherwise, we will file it on
8 the 7th per Judge Patterson's order.

9 THE COURT: You don't have to file a reply. I am
10 going to finish going through my outline. Then we are going to
11 take a break so that you get a chance to talk with each other
12 and come back and convince me why my tentative suggestions here
13 are wrong and I should change my mind, but right now there will
14 be no discovery until I issue a ruling on the motion to
15 dismiss.

16 If 5201 survives that motion to dismiss, right now I'm
17 thinking that discovery would proceed in all of the cases.
18 There is one caveat. If I got a sense that there was a really
19 strong statute of limitations argument in another case or two,
20 that the motion practice in 5201 didn't really tee up well, I
21 would be open to extending the discovery stay in that small set
22 of cases. That is my preliminary thinking.

23 So we use this time while the motion to dismiss is
24 being briefed and decided for you folks to talk about if
25 discovery starts how it would be organized both in terms of

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1 electronic discovery, sampling of documents, deposition limits,
2 etc. So we wouldn't have to waste any time. We could hit the
3 ground running after a motion assuming that it's denied.

4 Coordination: We have the Connecticut case before
5 Judge Thompson, and I looked at the docket sheet, and I have
6 some information about that case that we were able to glean.
7 It doesn't look to me -- feel free to correct me if I'm
8 wrong -- that those parties have had a conference. It is not
9 clear to me why there is a case in Connecticut. I'm happy to
10 take that case, but there may be very good reasons to have the
11 case in Connecticut. So, at the very least, if the case
12 doesn't come here and get folded into our coordinated plan, I
13 would want to reach out to Judge Thompson, and to the extent
14 that it makes sense and he agrees to coordinate what we do so
15 that the burdens on the parties are equally borne. So I will
16 just say that for now.

17 I am not aware of any other case brought by the GSEs
18 other than the Connecticut case. Are there others?

19 MR. SELENDY: That's correct, your Honor, that's the
20 universe.

21 THE COURT: OK. Good. Are there going to be more
22 filed?

23 MR. SELENDY: Well, I think that's a question for the
24 Federal Housing Finance Agency. I don't know if I can answer
25 that.

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1 MR.HART: Your Honor?

2 THE COURT: Sir, could you put your name on the
3 record?

4 MR. HART: Stephen Hart. There could be another case
5 or two, but that is a decision that will have to be made by the
6 director of the agency, and it will not come soon.

7 THE COURT: Thank you. Do you expect if it is filed
8 or they are filed, will they be in this courthouse?

9 MR. HART: That would be my anticipation.

10 THE COURT: Thank you so much.

11 In terms of coordination, I think we are up to in my
12 outline VNB Realty.

13 MR. TSAPATSARIS: Your Honor, if I may, Peter
14 Tsapatsaris for VNB Realty. VNB is the owner of a single
15 security that overlaps with the securities owned by FHFA in
16 case against Bank of America.

17 THE COURT: Keep your voice up.

18 MR. TSAPATSARIS: Of course. We filed this case
19 related case because we rely very heavily on the FHFA complaint
20 and the forensic review results that they report within. We do
21 think there are going to be significant common issues of fact.
22 However, the last thing we want to do is delay the FHFA case or
23 interfere with the schedule in that case. I did confer with
24 counsel for Bank of America who takes no position on
25 relatedness, and I have heard the Court's reticence to raise

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1 its hand and act as a lightening rod for private actions that
2 overlap all over the nation.

3 That being the case, I would like the opportunity to
4 confer with Bank of America again and Quinn Emanuel and then
5 submit a letter to the Court potentially withdrawing or setting
6 up arguments on why we think the case should be related.

7 THE COURT: OK. Well, we are unlikely to have another
8 conference on that issue. I am not saying we won't, but I
9 appreciate what you're saying. Let me just give you my
10 off-the-cuff reaction. I am happy to keep this case and fold
11 it in and coordinate document production and everything, but if
12 there were 15 more or 50 more private plaintiff lawsuits, I
13 would have to think really carefully about what we are doing
14 and if it makes sense for this core group to be joined by these
15 additional cases.

16 So, why doesn't everybody have a chance to think about
17 that, and you may all be in agreement. You may have
18 disagreements. And you will feel free to write me a letter no
19 longer than two pages.

20 MS. KOTLER: Your Honor, Meredith Kotler for Bank of
21 America. If we may, let me confer with my adversary over the
22 break, and perhaps we can come back to you at the beginning
23 with what might be a somewhat different position on this.

24 THE COURT: Thank you.

25 MS. CHUNG: Your Honor, I'm sorry, but just because --

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1 THE COURT: Ms. Chung.

2 MS. CHUNG: Christine Chung. Because it's come up a
3 couple of times, to make the record clear, FHFA does not
4 believe that the VNB case is related, so we would object to any
5 related designation, and the reasons have already been
6 discussed so I don't want to belabor the record. In fact, the
7 area of overlap is a single securitization. I think your Honor
8 started with, you are a private entity. That really is the
9 distinction. There are so many other cases where if this was
10 the rule, it could end up being the case that many -- the fact
11 that there might be overlapping securitizations is not the same
12 thing in our mind as saying there is true judicial efficiency
13 by putting that case together with this case. So we'll confer,
14 but I just wanted to make clear that our view is that the cases
15 are not related.

16 THE COURT: Good.

17 So why don't we take a break, and during the break
18 counsel can feel free to discuss any of the issues I've raised
19 and ask me to revisit them because they have now had a chance
20 to confer with each other and there is something they want me
21 to hear or suggest any additional issues that I haven't raised
22 at all that you think should be discussed at this conference.
23 Let's take a ten minute break.

24 (Recess)

25 (In open court)

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1 THE COURT: One issue I didn't mention was the
2 protective order. One of you mentioned it. So that is another
3 thing that should be worked on during our interim period here.

4 So I will just sort of in grand topic form, anybody
5 have anything they want to revisit on sort of the
6 administration aspects of the litigation?

7 Anybody have anything they want to revisit on the
8 overview issue of motion practice?

9 Ms. Shane.

10 MS. SHANE: Thank you, your Honor. Penny Shane,
11 Sullivan Cromwell. We have conferred about the idea of having
12 a separate or subsequent briefing on fraud issues or doing it
13 at the same time; and having conferred, the defendants' view is
14 that it would make sense for your Honor to receive a brief with
15 respect to the fraud issues, but that rather than pick a
16 particular case, the group believes your Honor would benefit
17 more from a single brief that seeks to address the fraud issue
18 as it arises in each of the six cases in which it arises, and
19 the defendants would work to coordinate to make sure that we
20 best present those issues in a way that successful and capable
21 of resolution.

22 As to the scheduling of it, your Honor, the defendants
23 are happy to be guided by your Honor's view of what makes most
24 sense, but we would suggest that in the event that the
25 plaintiff plans to amend the schedule your Honor already set

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1 out with respect to the UBS case, that amendment come with
2 respect not only to the UBS case but with respect to the cases
3 in which the fraud claim does arise so that we can all address
4 our motions to the amended pleading and can do it in a way that
5 will have some finality to it.

6 In the event that the plaintiff does not elect to
7 amend, we would suggest to your Honor that we could be on
8 roughly the same briefing schedule sort of carried a little bit
9 further back as your Honor has imposed in the UBS case, and
10 that in order to permit time to coordinate, we would be
11 prepared to file sometime in mid January.

12 THE COURT: So thank you. Very helpful. I think what
13 I would prefer to do then is pick one of the fraud cases. If
14 it is not 6188, that's fine. I am going to say I will presume
15 it will be 6188 but if defense counsel agree among themselves
16 it should be one of the other fraud cases, that's fine with me.
17 We will set a schedule today for you to move to dismiss. The
18 plaintiffs will have an opportunity to amend in response or to
19 oppose.

20 I am trying to think whether you should move to
21 dismiss before we see any amended pleading in 5201 or not. It
22 is now December 2. I think that amended pleading is
23 December 23.

24 MS. SHANE: December 21, your Honor.

25 THE COURT: December 21.

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1 MR. SELENDY: Your Honor, if the purpose is to test
2 the separate fraud allegations, then the amendment of the UBS
3 complaint would not appear to be relevant to that purpose, and
4 we would suggest as defendants have all been operating until
5 recently on the assumption that they would file their briefs by
6 today, that there be a very early date set such as next week
7 for the fraud claim.

8 THE COURT: Good. Thank you.

9 So let me throw this out as a possible schedule for
10 motion to dismiss in 6188; that the motion to dismiss be filed
11 January 6. If there is going to be an amended pleading in 6188
12 in response to that motion, it be filed January 27. If there
13 is no amended pleading, that the opposition be served
14 February 3, and the reply due February 17. How does that
15 sound, Ms. Shane?

16 MS. SHANE: That sounds fair, your Honor, and just to
17 clarify this motion in 6188 or such other case we may
18 substitute in would be a motion strictly addressing the fraud
19 claim notwithstanding that there are other issues that have
20 been and are being briefed fully in the UBS case, is that
21 correct?

22 THE COURT: I don't think so. I don't want to set up
23 a situation where we have multiple motions to dismiss in every
24 action. We either do this sort of concurrently or we don't do
25 it at all now, and we wait for an opinion on the motion to

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1 dismiss in 5201. I can see arguments both ways. I'm sure you
2 can too. I think there is such a benefit from getting you a
3 decision sooner rather than later that argues in favor of
4 concurrent briefing.

5 MS. SHANE: We recognize that as well, your Honor,
6 which is why we suggested that we go ahead and do a brief on a
7 rough and contemporaneous schedule. The concern I think may be
8 that whichever case ends up being the vehicle for that briefing
9 will be in a position unlike either the UBS case that has come
10 before or those that are to come after in the sense that while
11 addressing the fraud claim, there will be a need to anticipate
12 a ruling with respect to the other common issues that have been
13 briefed by UBS but not decided yet and no instruction will yet
14 have been given.

15 So that that second test case might be thought of as
16 foregoing the opportunity to analyze your Honor's decision,
17 avoid duplication of argument or repetition of anything that
18 you have properly decided once you get around to deciding the
19 UBS case, but that opportunity shouldn't be lost, I don't
20 think, and the repetition that would result from having to
21 anticipate how your Honor might rule on the UBS issues and how
22 that might or might not affect that defendant might be worth
23 seeking to avoid.

24 MR. SELENDY: Your Honor, if I may, in the ordinary
25 course, defendants would have to file their motions without

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1 some initial test rulings being made available by the Court.
2 So the idea that it would be somehow inadequate for defense
3 counsel to have to file motions just two motions across 18
4 cases without having initial guidance.

5 THE COURT: 17 --

6 MR. SELENDY: Well, I left open the fact we have also
7 the RBS complaint then.

8 THE COURT: No, Connecticut is what I am thinking of.

9 MR. SELENDY: Yes. Yes.

10 THE COURT: Hopefully 18.

11 MR. SELENDY: So, in light of that we submit that
12 there should not be further delay from discovery in particular
13 by waiting for a ruling on the first test case before having
14 another test case.

15 Further, your Honor, although you've suggested that
16 defendants could select, we think the process should be
17 non-arbitrary, and it should be the lowest docket number JP
18 Morgan rather than some selection by defendants among them.

19 MS. SHANE: Your Honor, may I suggest as a way to
20 resolve the difficulty or clarify, we are not looking for an
21 opportunity to have another brief that is any different than
22 the other brief that your Honor's current schedule contemplates
23 from those defendants who are to become educated, as everybody
24 will become educated, by the result of the UBS brief.

25 So that simply in order to prevent the one defendant,

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1 which JP Morgan will be happy to be, from being in a different
2 position, all that we would seek to have happen is that JP
3 Morgan would likely adopt and reiterate the arguments that have
4 been made by UBS and would not take the trouble to try to
5 anticipate, distinguish and otherwise show how they will apply
6 when they haven't yet been rendered and will not be prejudiced
7 at such time as your Honor renders decision in the UBS case by
8 the fact that JPM has filed a brief already with respect to the
9 fraud issues adopting the UBS arguments, but instead would have
10 the same opportunity other defendants would have to present to
11 your Honor distinctions, if any, from the UBS ruling that
12 deserve your Honor's attention on those common issues only.

13 THE COURT: Counsel know their pleadings. I don't. I
14 love the idea, Ms. Shane, that you will just adopt arguments
15 that have been made in 5201 on common issues and not seek to
16 submit different briefing with respect to those issues. I
17 would encourage that approach. I am not sure that you are
18 going to get a second chance to revisit any of the issues. If
19 6188 has one motion to dismiss, I think I will decide that
20 motion to dismiss, and that's going to be it.

21 MS. SHANE: Thank you, your Honor.

22 THE COURT: So we will get out a scheduling order
23 adopting my proposed schedule in 5201 and the proposed schedule
24 I've just outlined in 6188, and if there is a substitution at
25 defense counsel's choice of a different fraud case than 6188,

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1 counsel, I would ask you to advise me of that by December 9.
2 Is there.

3 Is there any other issue that counsel wish to raise
4 with me on the general topic of the motion practice?

5 With respect to discovery, counsel, we are going to
6 confer about some scheduling here of proposals. Do we have a
7 date by which you would have completed your discussions on
8 electronic discovery protocols?

9 MR. SELENDY: Unfortunately, your Honor, we did not
10 have an opportunity to confer with defense counsel. It seems
11 that we each were participating in our own meetings. I would
12 suggest that we come back in as to each of the issues you've
13 raised -- sampling, electronic discovery, depositions and
14 protective order -- in early January, perhaps January 6, and
15 inform the Court of the results of discussions.

16 THE COURT: I would look forward to seeing everyone
17 again, of course, but I know that it is a real burden on
18 counsel and your clients to spend an afternoon in this
19 beautiful courtroom.

20 So, I will take a report from counsel, and hopefully
21 it will be a joint report with a proposal that I can adopt on
22 January 10, and it will address a protective order, ediscovery,
23 sampling of documents, that's for loan files, and limits on
24 depositions, and, of course, a proposal with respect to the
25 time frame for document production and a separate proposal for

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1 time frame for depositions and then for expert discovery and
2 summary judgment practice.

3 MR. CLARY: Your Honor, had also mentioned before the
4 break --

5 THE COURT: Mr. Clary?

6 MR. CLARY: I'm sorry. Richard Clary for the Credit
7 Suisse defendants.

8 Before the break, your Honor, had also mentioned
9 potentially sequencing of discovery, and I assume you would
10 like that addressed in the report.

11 THE COURT: Yes. What I am hoping then you will do is
12 set up a series of meetings among yourselves in December and
13 early January so if at all possible I get a report that shows
14 consensus on these issues. Obviously, if you can't reach
15 agreement, you can't.

16 Anything else with respect to the general issue of
17 discovery?

18 Anything to discuss on the general topic of
19 coordination?

20 MR. TSAPATSARIS: Peter Tsapatsaris for VNB.

21 I conferred with counsel for Bank of America and
22 counsel for FHFA during the break. Bank of America's counsel
23 has informed me that they now plan to contest the relatedness.
24 I would like -- I know your Honor was hesitant to grant me this
25 before -- an opportunity to confer with my client. We came in

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1 here thinking it was unopposed, and the Court has raised
2 concerns and FHFA counsel has raised concerns, B of A's counsel
3 has raised concerns which may cause us to withdraw that
4 request.

5 I would ask the Court to give us leave to file a
6 two-page letter after I confer with my client which will either
7 state our grounds for why it should be related or withdraw the
8 request for the relatedness.

9 THE COURT: Good. Shall we say I'll get such a letter
10 no later than December 9?

11 MR. TSAPATSARIS: Yes, your Honor.

12 THE COURT: Thank you.

13 Any other coordination issue?

14 Settlement: Have the parties talked about a process
15 for settlement discussions?

16 MR. SELENDY: Your Honor, Philippe Selendy. There
17 have not been global discussions with all of the defendants nor
18 has there been discussion of a general process. There have
19 been certain discussions with certain parties.

20 THE COURT: While I encourage you all to think about
21 settlement at any time, I am going to assume that you need a
22 decision on the motion to dismiss at least in 5201 before you
23 can really talk seriously about settlement. So I plan to
24 address that motion.

25 If the motion is denied and if all of these cases are

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1 going forward into discovery, I plan to refer you to Magistrate
2 Judge Maas initially and potentially to a senior judge on this
3 court for supervision of settlement discussions.

4 If counsel decide among themselves that they would
5 prefer to make other arrangements for settlement process, that
6 would be just fine with me, and that would relieve you of the
7 obligation to participate in good faith in the settlement
8 discussions before Judge Maas. So that is how we will leave
9 that.

10 But I do want after a decision on the motion to
11 dismiss if it is denied for you to at least begin those
12 discussions.

13 Is there any other issue we need to address this
14 afternoon?

15 MS. CHUNG: Your Honor, we had the remand issues.

16 THE COURT: Yes. Yes. I know, Ms. Chung.

17 MS. CHUNG: I think it was in some category. I was
18 looking back at my notes.

19 Your Honor, you have before you four of the FHFA
20 actions that were commenced in state court. There is a
21 threshold issue of whether the cases have been properly
22 removed. Mr. Kasowitz's firm has three of those cases.

23 In the Countrywide case, which is the one that our
24 firm is handling, we had gotten on the phone with Judge
25 Rakoff's chambers within days of the case being assigned to him

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1 with cross applications, and there was an application from the
2 defendants to stay any consideration of what was going to be
3 our motion to remand. We had asked to have a briefing schedule
4 on the motion for remand that pretty closely complied with the
5 rules of the Court.

6 The Judge turned down a request by the defendants to
7 have a slower schedule, and within a month we were fully
8 briefed and were scheduled to have the argument on this very
9 dramatic day when we got the announcement that the case was
10 being transferred.

11 So, in this case our concern is, did the Judge order
12 that the motion for stay and motion for remand be briefed
13 contemporaneously. If that schedule had been kept, there is,
14 as your Honor noted, this issue of the JPML transfer motion.

15 It is now agreed by the parties, it's been conceded by
16 the defendants, that the first time it appears that JPML would
17 consider the transfer motion is January 26.

18 We had made a big effort -- and I think Judge Rakoff,
19 he had set a schedule by which it would have been possible to
20 have a decision on that threshold issue well before the JPML
21 would begin even to consider transfer, much less the remand
22 motion if the case were to be transferred.

23 Our view is still that the judicial efficiencies and
24 the efficiencies for the parties is to finish off this process
25 of having the oral argument in the Countrywide case. It is a

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1 case in which this one thing somehow has become sort of --
2 there was a big consequence of having reassignment of cases,
3 which this piece was moving forward at quite a good clip and is
4 now in abeyance.

5 So, we would renew our request to have the argument
6 rescheduled, and I don't know if Mr. Kasowitz wants to address
7 the other remand motion separately.

8 MR. KASOWITZ: Simply, that there is a schedule for
9 the other remand motions. There is a schedule set. There is
10 going to be reply in the Morgan Stanley case filed today and
11 oppositions in the other two cases filed today, and there are
12 dates set for replies then your Honor.

13 THE COURT: Good. And, of course, you can consent to
14 removal at any time.

15 MR. KASOWITZ: Understood, your Honor. Thank you.

16 MR. PASTUSZENSKI: Your Honor, if I my Brian
17 Pastuszenski from the Goodwin Procter firm for the Countrywide
18 defendants.

19 Your Honor, I simply want to note that, as Ms. Chung
20 pointed out, there is both pending a motion to remand and a
21 motion to stay in light of the fact that the judicial panel of
22 multidistrict litigation has conditionally transferred the case
23 and your Honor received letters from the parties, from
24 Ms. Chung and then from myself, regarding acceleration of that
25 hearing.

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1 There is the ID case, which is Second Circuit
2 authority, which speaks to the efficiencies of letting the
3 transferee judge decide these issues. Those are all before
4 your Honor. If your Honor knows those issues, I simply want to
5 point out that the briefing process on the conditional transfer
6 order is now complete. That is now fully briefed. It's before
7 the panel. The next hearing session is January 26. We don't
8 know when the panel will issue a ruling, but it has been fully
9 briefed, and it's ready for decision now by the MDL panel.

10 The MDL panel has referred transferred to Judge
11 Pfaelzer 13 mortgage-backed securities cases those include both
12 class cases, most them are individual institutional investors
13 like the cases your Honor has before you. There are also an
14 additional five mortgage-backed securities cases that have been
15 conditionally transferred. This is one of them. Those are in
16 front of Judge Pfaelzer, and the multi-district litigation
17 process is now proceeding forward in front of her.

18 So, your Honor, what Judge Rakoff had in front of him
19 and what was scheduled for hearing on the 16th was not simply
20 the remand issue, but, frankly, also the parallel motion to
21 stay all of that pending action by the JPML. Because as we
22 noted to Judge Rakoff and noted in the letter to your Honor,
23 one of the core issues that is before your Honor to decide
24 which is in two of the other cases; namely, bankruptcy related
25 to jurisdiction has been addressed a number of times already by

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1 Judge Pfaelzer.

2 I simply want to provide that context, your Honor.
3 Thank you.

4 THE COURT: Thank you very much.

5 MS. CHUNG: Your Honor, I'm only rising again to
6 respond to your Honor's comment that, of course, we can always
7 consent to removal. I want to say that in the Countrywide
8 case, of course we knew about the MDL. Among considerations,
9 the FHFA has statutory top prerogative to file in state court
10 or federal court. In the Countrywide case, there was this
11 unique situation where we knew that as soon as we filed in
12 federal court, Countrywide was going to try to get the case
13 swept into the MDL.

14 I want to make it clear in terms of your Honor's
15 proposal, we'd be very willing to consent to removal. So, we
16 would forego our remand motion if the defendants would agree
17 not to pursue their transfer motion to the MDL. So that would
18 be a way that in that case we would be willing to resolve this
19 issue of the remand motion and the transfer motion. So just to
20 advance the ball that much.

21 THE COURT: Well, I think that would be a wonderful
22 result personally, and I encourage counsel to discuss that with
23 each other. I am not going to ask for commitment from
24 Countrywide on the record one way or the other now, but why
25 doesn't everybody reflect, and why don't you let me know what

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1 your positions are -- December 9 seems to be a popular date --
2 so by December 9.

3 MR. PASTUSZENSKI: Your Honor, if I may very, very
4 briefly, Brian Pastuszenski, Goodwin Procter for the
5 Countrywide defendants.

6 I will certainly confer with Countrywide and will let
7 you know by the 9th Countrywide's response or actually the
8 response of the defendants, because there are other defendants
9 in the case, to the proposition that Ms. Chung just addressed
10 to your Honor.

11 But one thing I want to make clear, your Honor, is
12 that there seemed to be an implication that rushing things to
13 the MDL. The reason the multidistrict litigation proceeding
14 exists at all, your Honor, is that starting in the third
15 quarter of 2007, four years ago, your Honor, litigants that had
16 bought, investors had bought mortgage-backed securities began
17 suing Countrywide for the very same things that the FHFA is
18 today alleging in the complaint against Countrywide that your
19 Honor has. More than four years ago, your Honor.

20 The reason that MDL exists is because there are
21 multiple actions, both class and individual, that had at their
22 core the common allegations about alleged abandonment of
23 underwriting guidelines, manipulation of appraisals and so
24 forth. The reason the JPML formed the MDL was because of the
25 extraordinary commonality and extraordinary efficiency of

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1 having one judge deal with those allegations against
2 Countrywide.

3 So, Ms. Chung is right that had this case been filed
4 immediately or initially in federal court, it would have been
5 tagged, but it would have been tagged because of those
6 efficiencies, because of the common factual allegations,
7 because of the common legal issues that all of the cases
8 against Countrywide present.

9 So, I wanted to make clear that this isn't some sort
10 of litigation strategy. It has to do with the fact that all of
11 these cases allege fundamentally the same thing, your Honor.
12 This one, the many, many cases that are in front of Judge
13 Pfaelzer, frankly, whether they involve mortgage-backed
14 securities, common stock or other kinds of securities, they've
15 all been alleging the same things since August/September of
16 2007, your Honor, which, by the way, also in the Countrywide
17 case, as in these other cases, presents some very, very serious
18 statute of limitations and statute of repose issues.

19 But with respect to the MDL, that has to do with the
20 efficiency and the commonality of the allegation against my
21 clients.

22 THE COURT: I appreciate that you are trying to let me
23 down gently here, but on December 9 continue to cede the
24 transfer. There are many different ways to achieve efficiency,
25 of course, and you are arguing in favor of a common defendant.

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1 We are here because of a common plaintiff. There are many
2 different ways to slice and dice this. So, we are all trying
3 to do our best here to try to figure out how to reduce
4 litigation costs and get to the merits in an efficient way.

5 MR. PASTUSZENSKI: Absolutely, your Honor. There is
6 no disagreement. We will respond to your Honor by the 9th.

7 THE COURT: Good. Thank you all for your cooperation
8 today.

9 (Adjourned)